

one of the creditors on the estate, Mr Gowans, whose claim is on bills, in order to settle for a less sum. The widow and children object to this, and think it serious enough to make it necessary for them to put the matter in the hands of the Court. This is just as much as saying that when any dispute arises as to what is due to one creditor the trustee is to be superseded altogether, and this action has been clearly brought to stop the management of the trustees. To some extent these are questions of circumstance, but that is no reason for throwing the whole estate here into the hands of the Court. I concur then in dismissing the action. As to the case of *Kyd v. Waterson*, I remember the case perfectly well. It dealt with the private trust for creditors of a bankrupt debtor, and the idea was that on any dispute the Court should become the distributor of the bankrupt estate. We said "Sequestrate if you like; but we are not trustees in bankruptcy." The case is quite different from the present, and is no authority in point, but is nevertheless in my opinion well decided.

**LORD YOUNG**—I am of the same opinion. The trust here is a testamentary trust by a deceased builder who had carried on a speculative business and whose estate consisted of building stances more or less in an advanced state heavily loaded with debt. The only prospect of making anything out of the business was to effect a beneficial arrangement with the creditors by getting them to take a dividend.

The truster died in October 1875, and he gave his trustees full powers to carry on his business. These trustees are therefore the trustees of this speculative builder and contractor, appointed for the purpose of administering on his death any affairs which involve building. Accordingly in 1877 or 1878 they made an arrangement with some of the creditors to take a dividend of six and eightpence in the pound. Fortunately they could not raise the money, and the arrangement fell through. I say fortunately advisedly, because in 1879 the unsold property turned out of value not previously thought of, namely, of the value of £4000. An arrangement was then made by which most of the creditors were induced to accept ten shillings in the pound. The only claim which is still unpaid of considerable amount is that of Mr Gowans, who has agreed to accept the composition of ten shillings in the pound, and it is as to his claim that this action of multiplepointing has been brought. Now, why should we interfere with the management of the trustees? It is their duty to consider each claim; if they think it reasonable they will entertain it, if manifestly frivolous they will dismiss it. The Lord Ordinary says it is with extreme regret that he is not able to allow a multiplepointing here. It is pleasant to see such a healthy appetite for judicial administration, but I think that a multiplepointing would be altogether incompetent. There is no authority for it, and none of the cases touch it. I agree, then, with your Lordships in thinking that the action should be dismissed. As to the case of *Kyd v. Waterson*, which the Lord Ordinary has referred to, I concur with your Lordships. As Lord Gifford says, it was a case of a farmer who executed a disposition *omnium bonorum* in favour of a friend with directions to pay his creditors. A creditor then brought a multiplepointing in

name of the voluntary trustee—that is to say, he asked the Court to execute the trust. We said—"Is your debtor solvent? If so, bring an action against him, and you will get payment if the debt is really due. If he is insolvent, his estate will be administered by the bankruptcy laws." But a multiplepointing brought by a non-acceding creditor to administer a trust which he repudiates is altogether incompetent, and yet this has alarmed the Lord Ordinary as to the comprehension of multiplepointings. He says—"Should the decision referred to become the rule and practice, it will materially diminish the utility of actions of this nature. It materially circumscribes the circumstances in which such actions may be made available, and the comprehension as well as the efficacy of a multiplepointing are therefore most materially diminished. A multiplepointing, regarded as now it must be regarded, is no longer a congeries of all actions—no longer a solution of troubles while the thing is still open, and the liabilities of all, so to speak, will be determined before anything past real has been performed." It is a congeries of actions because each claim is the one necessary to establish the debt; it is a bundle of as many actions as there are claimants, with different grounds of action. But how this interferes with multiplepointings which are competent I do not see, and there is no explanation given, and therefore I think that the Lord Ordinary has been either misapprehended or his words misprinted.

The LORD JUSTICE-CLERK was absent.

The Court sustained the third plea for the nominal raisers and objectors, and dismissed the action.

Counsel for Real Raiser and Reclaimer—Kinnear—Rhind. Agents—Simpson & Wallace, S.S.C.

Counsel for Nominal Raisers and Respondents—Solicitor-General (Balfour)—Lang. Agents—Paterson, Cameron, & Co., S.S.C.

Wednesday, July 7.

## SECOND DIVISION.

WEST STOCKTON IRON COMPANY *v.* NIELSON & MAXWELL.

*Agreement—Construction of.*

*Held (diss. Lord Young)* that where goods of a certain nature and quality are ordered from a manufacturer, it is not a good ground for refusing to accept delivery of goods tendered in implement of the contract that they are not of his own manufacture, provided that they are of the nature and quality stipulated for.

On 6th November 1877 Messrs Nielson & Maxwell, iron and metal merchants in Glasgow, wrote to Messrs Armstrong Brothers, brokers there, the following letter:—"Please let us know your lowest price for 200 tons of plates, casset limits; quality to pass Lloyd's inspection; for delivery from now till end of June 1878." On 8th November Armstrong Brothers replied as follows:—"Our friends, the West Stockton

Iron Co., Limited, offer you the 200 tons ship plates, delivery between now and end of June next, at £6, 10s. less 2½% f.o.t., makers' works, Stockton." Nielson & Maxwell had till then no knowledge of the Stockton Iron Co., but being thus brought into communication with them, wrote to them mentioning the place at which they desired delivery to be given, and a contract was entered into, which was expressed in the following bought-and-sold note, which was signed by both parties:— "November 10, 1877.

"In the case of strikes or combinations of workmen or accidents causing the stoppage of the works or other unavoidable causes, the supplies of iron now contracted for may be suspended during their continuance. This clause applies to buyers and sellers.

"Bought of The West Stockton Iron Company, Limited.

"Ship Plates.

Quantity, Two hundred, 200 tons.

Quality, To pass Lloyd's surveyor.

Price per ton, Six pounds seventeen shillings and sixpence, £6, 17s. 6d., csettle limits.

Extras as per their list.

Time of delivery, First six months of 1878.

Place of delivery, Usual Clyde delivery.

Terms of payment, Cash less 2½% on the 10th of month following delivery."

Owing to the failure of Nielson & Maxwell to furnish specifications, in terms of the contract, the delivery of the plates was not completed during the time contemplated by the contract. The West Stockton Iron Co., however, did not cancel the contract, but delivered to Nielson & Maxwell after the period of delivery under the contract had expired 82 tons of iron. On 18th June 1879 the West Stockton Co. wrote to Nielson & Maxwell as follows:—"We beg to inform you that in consequence of our inability to secure sufficient specifications to keep our works going, we are compelled to close them for the present, and have therefore made arrangements with some of our friends to manufacture for us the iron which we are under contract to deliver to you. In deference to your wishes, and by reason of your being unable to specify in accordance with the terms of your contract with us, the delivery of the iron sold to you has been deferred, and the whole of the balance is now in arrear. Having regard therefore to the arrangements we have made with the firms who will manufacture the iron for us, and to prevent complications with them, we must ask you to be good enough to let us have specifications for the quantity due (about 118 tons) without delay." They received this answer—"June 19, 1879.—We are favoured with your letter of yesterday, and regret that you have been obliged to close your works. We prefer to wait till you have reopened before specifying for more plates." The West Stockton Iron Co. thereupon replied, giving notice that, as specifications had not been furnished as requested, they would not now accept any, and requesting a cheque for £181, 18s. 4d., the difference between the contract price and the market price of the day on the undelivered balance of the contract. Payment of this sum being refused, the West Stockton Iron Co. raised the present action, concluding for £181, 18s. 4d. as damages for breach of contract.

A proof was allowed, at which the following

admissions were made—" (1) That pursuers were able to supply the iron contracted for, of their own manufacture, down to the date of the stoppage in June 1879. (2) That thereafter pursuers were able to supply the iron, not of their own manufacture, but of the manufacture of the Stockton Malleable Iron Company, that being equally good, and of equal marketable value with pursuers' iron. (3) That pursuers' works were closed on 18th June 1879 from the failure of defenders and others to specify in terms of contract. (4) That pursuers' plates were branded 'W. S. Stockton,' in conformity with the practice of all makers of plates, and in accordance with Lloyd's rules. (5) That the price in June was £4, 15s., or including 11s. 8d. of carriage from Stockton to the Clyde, £5, 6s 8d.; and in September £5, 2s. 6d., or including carriage, £5, 14s. 2d. (6) That in order to enable pursuers to execute the contract, it was necessary for defenders to furnish specifications. (7) That the clause in the contract as to strikes applied both to buyers' and sellers' works. (8) That pursuers' works have not been re-opened. (9) That there was no communication (except in writing) between the parties after June 1879." The parole evidence led was conflicting as to the existence of any custom in the iron trade whereby a manufacturer who is from any cause unable to deliver iron of his own manufacture, may deliver iron of equal value manufactured by another manufacturer.

The Lord Ordinary (Young) on 12th March assolizied the defenders and found them entitled to expenses. His Lordship delivered the following opinion:—

"Opinion—I do not think this action will do. I think an offer of the Stockton Malleable Iron Company's iron would have been a good answer to a claim of damages upon the part of the defenders; but I do not think what would have been a good answer to a claim of damages is an offer of delivery which defenders are bound to accept. A good answer to a claim of damages is money as well as iron of equal quality to that which was contracted for—indeed money is the universal solvent, and is what is generally given in satisfaction of a claim of damages for breach of contract. Therefore the criterion that a tender of Stockton Company's iron would have been a good answer to a claim of damages will not hold. The contract was no doubt broken in the first instance by the defenders, who were bound by it to take delivery during the first six months of 1878, and upon that breach it was in the option of the pursuers to cancel and claim damages or not as they pleased. They pleased not to do so, and went on with the execution of the contract. They had their own reasons for the preference no doubt, and they did not cancel the contract until June 1879, when admittedly they were themselves not in a condition to implement it according to what I am clearly of opinion is the import of it. The import of it is, in my opinion, that they shall supply, and that the defenders shall be entitled to receive from them, ship plates of their own manufacture. It may be that ship plates of their own manufacture are no better than—even in the opinion of some, not so good as—ship plates not of their own manufacture. But the contract, as I read and interpret it, is for ship plates of their own manufacture, and when

they are not in a condition to tender delivery of ship plates of their own manufacture, I do not think they have any right of action by tendering delivery of ship plates of another manufacture, although equally good. That tender might be a good answer, as I have said, to a claim of damages against them for a breach, but will not found an action at their instance for breach against the party who declines to take delivery of ship plates of any other manufacture than the contract specifies. I think the contract does specify the manufacture of the West Stockton Company from the very fact of its being made with them. I therefore assolzie the defenders from the conclusions of the action, and I am sorry that I must find the pursuers liable in expenses. I am sorry for it, because I think they behaved liberally towards the defenders in extending the time for specifying and taking delivery, although no doubt they acted with a view to their own legitimate advantage, keeping their contract and keeping their customer notwithstanding that he did not take delivery during bad times."

The pursuers reclaimed, and argued—It was plain that what the defenders wished was iron of a certain quality without reference to any particular maker. This was plain from the defenders' original letter to Armstrong Brothers. They wished iron which would pass "Lloyd's survey." It was no qualification of the contract that such iron should be manufactured by the West Stockton Co., as it would have been had quality not been mentioned. The rule of Lloyd's that all iron for shipbuilding must be branded by the manufacturer was intended to enable the maker of bad plates to be traced. Had nothing been said about quality, it might then have been inferred that there was *delectus personæ*. Had they been too busy at any time to supply plates, would they not have been entitled to supply plates of equal quality made by others? Though the evidence of custom was conflicting, that which came from the Stockton district showed that there was a custom in that district at least of the nature alleged. Besides, the pursuers were dealers as well as manufacturers. This was an attempt by the defenders to escape by means of a technicality from a contract they were unwilling to fulfil. They quoted *Hopkins v. Hitchcock*, April 21, 1863, 32 L.J., Com. Pleas, 154.

Argued for defenders—The question was, whether delivery of iron manufactured by another firm was within the contract. The authorities in England show that when there are conditions in a contract it is not requisite in order to found on the letter of the contract to show that such conditions are material—*Boulton v. Jones*, Nov. 25, 1857, 2 Hurlstone and Norman, 564; *Bowes v. Shand*, H.L., June 7, 1877, 2 L.R., App. Ca. 455. When goods are ordered from a maker of them, it is implied that the buyer relies on the skill and reputation of the maker. It is incompetent to refer to letters written to a broker before a contract is made when a contract is to be construed.

At advising—

LORD GIFFORD—The pursuers, the West Stockton Iron Co., Limited, claim damages from the defenders for breach of contract in respect the defenders refused and failed to take delivery from the pursuers of 118 tons of iron ship plates, being the balance of 200 tons of ship plates which the

defenders had purchased from the pursuers under the written contract libelled. At the time when the defenders refused to receive the 118 tons of ship plates, the price in the market was considerably less than the price which the defenders had agreed to pay under the contract, and the damages sued for is this difference of price which the pursuers have lost by the defenders' refusal to accept the 118 tons and to pay the contract price therefor. There is no dispute as to the amount of damages if there has really been a breach of contract by the defenders refusing to take delivery of the 118 tons in June 1879.

The defence is in substance (and I think the whole question turns upon this one point) that in June 1879 the pursuers were unable to deliver ship plates of their own manufacture, their works having been temporarily shut up and stopped on or about 18th June 1879, and that the plates which the pursuers proposed to deliver were to have been manufactured, not by the pursuers themselves, but by other manufacturers, namely the Stockton Malleable Iron Co., Limited, who had agreed to make the plates to enable the pursuers to fulfil their contract with the defenders. The defenders say that on a sound construction of the contract it was a condition thereof that the ship plates to be delivered in terms thereof should be exclusively of the pursuers' own manufacture—that is, that they should be made at the pursuers' works, where they were carrying on the manufacture at the time when the contract was entered into; that the pursuers were not entitled to tender, and the defenders were not bound to accept, ship plates made by any other manufacturer than the pursuers, however unexceptionable they might be in quality or in sufficiency for the purpose for which they were bought. In short, that even although the plates tendered might be in every respect identical with those made by the pursuers, or even of superior quality, the defenders say that under the special contract in question it was an implied condition of the contract that the ship plates which the pursuers agreed to furnish, and which the defenders agreed to accept and pay for, should be all manufactured by the pursuers themselves at their own works. This is the view taken by the Lord Ordinary, who has assolized from the claim of damages on the ground that after 18th June 1879 the pursuers were not in a condition to offer delivery of iron ship plates made at their own works, and he holds that the defenders were not bound to accept of iron plates, however unexceptionable in quality, which were manufactured by anybody other than the pursuers themselves.

The question is a narrow one, but I am of opinion that it is really rather a question of fact than a question of law. I think here, as in all such cases, that the question of fact is, Was it part of the contract? that is, Was it an inherent condition of the contract that the ship plates should be exclusively the manufacture of the pursuers themselves?

I am not prepared to lay it down as an absolute rule that when goods are ordered from a manufacturer, even in cases where the manufacturer is not also a merchant or dealer, it is to be held universally that the contract can only be fulfilled by the delivery of goods made by the seller himself. On the contrary, I think that in each case this must be determined by the terms of the con-

tract and by the surrounding circumstances. Where such a condition is intended, it can easily be expressed in one or two words. Thus, where the purchaser stipulates for goods "of your brand," or "of your manufacture," or "from your works," this would be enough, and the seller would not be allowed to substitute goods of the same kind from other sources. In other cases such a condition may be very easily inferred, as when the thing sold is a specialty which the seller alone produces, or produces under a special name which is separately known in the market, or where there is a *delectus personee*, in order to secure the personal skill of a particular manufacturer. Thus, in orders given to an artist for works of art, and in all similar cases, there would arise a presumption that the artist himself was to devote his skill in the production, or at least in the superintendence and finishing, of the articles ordered. But in almost all cases of ordinary goods, and of goods which do not infer the work or skill of a special person, I think it is a question of circumstances and of evidence whether or not it is *pars contractus* that the goods shall be manufactured in any special factory. When the goods ordered are not prepared by any special process, but are produced by ordinary and common machinery universally employed for the purpose, there will, I think, be no necessary implication that the machinery belonging to the seller shall alone be employed in their production. For example, if planks or sawn wood be ordered from a proprietor of sawmills, the wood being specified as of a particular kind, size, and thickness, it would be difficult to say that it was a condition of the contract that it should be sawn by the seller's machinery and not otherwise. So, if malt be purchased from a maltster, it will generally be of no consequence where it was malted; or if flour be purchased from a miller, it will probably be of no consequence where it was ground, whether at the seller's mills or at other mills in the neighbourhood. In such cases a special condition would, I think, be required to prevent the seller from availing himself of the mills or of the machinery of friends. And so on in other cases which may easily be figured.

Now, in the present case I am of opinion that it has not been established, and that there are no sufficient grounds for inferring, that it was a condition of the contract between the pursuers and the defenders that the plates ordered should be made at the pursuers' works. On the contrary, I am of opinion that it sufficiently appears that this was not a condition of the contract, and was not in view by the parties. I think the correspondence which preceded the contract, and which has been admitted and made part of the evidence in the case, establishes that the defenders in applying to Armstrong Brothers for ship plates—and this is the letter that led to the present contract—did not mention any particular factory, but allowed Messrs Armstrong to suggest any manufacturer, only stipulating for a quality to pass Lloyd's inspection. It was Armstrong Brothers who suggested the pursuers, and it was they that carried through the ultimate contract, and there was no *delectus personee* and no choice of any special iron work on the part of the defenders. In the written contract the only stipulation as to quality is that the plates shall pass Lloyd's surveyor. Mr Maxwell, one of the defenders, who is

examined as a witness, does not say that he made choice of the defenders' works, or that he had any reason for doing so. On the contrary, he explains that he did not buy the plates for any special shipbuilder, and that he had no contract with such. He says—"I bought as a merchant on speculation." The specifications (that is, the details as to size, thickness, and form of plate) "were supplied by general customers—any persons who would buy." The 82 tons (that is, the plates actually delivered) "were supplied to different persons in Scotland;" and he explains that his customers were never asked anything about the makers of the plates.

I think the other evidence in the case shows—at least the preponderance of the evidence is—that in such contracts it is of no consequence who makes the plates, and that one maker often supplies plates procured from other makers. Mr Watson of the Stockton Malleable Iron Co., Mr Stoker of the Moor Iron-works and of the Egglestone Foundry, and Mr Prosser, the pursuers' manager, all prove that it is common for one manufacturer to supply plates made by another; and although there is cross evidence by Mr Bain and Mr Tolmie, it is only of a negative kind—that they have not known this to be done—and they do not speak to any instance of an attempt to do so which was objected to and resisted. It seems also sufficiently proved that although in shipbuilding according to Lloyd's rules the plates must all be stamped with the makers' names, still no value attaches to any particular brand, but Lloyd's surveyor passes all according to their intrinsic quality. Mr Watson says that the plates of the Stockton Malleable Iron Co. and those of the pursuers "are indistinguishable except by the brand. The quality and value of both are the same. No distinction is made between them in the market. It is matter of frequent custom for one manufacturer to supply another with plates when he cannot execute all his orders at his own works."

On the whole, therefore, I think that in the present case there was no condition that the plates sold should be exclusively of the pursuers' own manufacture. The strike clause in the contract does not militate against this view, for that was an additional precaution available to the manufacturer, and strikes are very often widely spread and extend over whole districts, and often limit the supply of the whole manufacture.

Nor is there any consideration in equity entitling the defenders in this case to plead that they are only bound to take plates of the pursuers' own manufacture. It is admitted in the note of admissions that the pursuers were able to supply the iron contracted for of their own manufacture down to June 1879. The defenders were bound to have specified for the whole contract prior to the end of June 1878, and it is specially admitted that it was owing "to the failure of the defenders and others to specify in terms of contract" that the pursuers' works were closed at all. No doubt the failure and delay on the part of the defenders for a whole year was condoned, but it would require a very clear case of proved contract to entitle the defenders to avail themselves of a stoppage which they themselves by their failure had caused. There is no real interest in the defenders to maintain that the plates were to be of the pursuers' exclusive manufacture, excepting the avoid-

ance of damages for the defenders' breach, for both parties have expressly admitted that the plates of the Stockton Malleable Iron Co. were "equally good and of equal marketable value with the pursuers' iron." Upon the whole, therefore, I am of opinion that the claim of the pursuers for damages is well founded. The amount of damages has, as already mentioned, been adjusted by the parties.

LORD YOUNG—This is an action of damages for breach of contract. The contract is for the sale of 200 tons of ship plates by the pursuers (manufacturers of the article) to the defenders (iron merchants), to be delivered in the "first six months of 1878," the price to be paid on the 10th of month following delivery. It is admitted "that in order to enable pursuers to execute the contract it was necessary for defenders to furnish specifications;" that no specifications were furnished till after the expiry of the time limited by the contract; that thereafter, viz., between October 1878 and May 1879, 82 tons were specified for and delivered; that the contract has been no further executed; and that the pursuers' works were closed on 18th June 1879, and have not since been reopened.

Before proceeding further it is proper to ascertain the effect in the circumstances of the expiry of the time of delivery limited by the contract—not only before it was completely executed (which it has never been), but as it happened before it was acted on at all. It is admitted that the defenders, and not the pursuers, were in default, and it is therefore clear that on the expiry of the time limited the pursuers were entitled either to uphold the contract and insist for implement by the defenders, or to cancel it and sue for damages for breach. They chose the former alternative, and the considerations, in a business point of view, which induced them to prefer it are obvious enough, though immaterial to the question now before us. Pursuing it they induced the defenders to take delivery of 82 tons after the expiry of the specified six months. Their right to enforce the contract against the defenders was thus continued after the elapse of the period originally limited, and endured so long as they were themselves able and willing to implement it on their part. But having thus elected, presumably in their own interest, to uphold the contract, they must stand by their election, and are no longer at liberty to cancel by reason of the defenders' prior breach, although no doubt a right to cancel and claim damages might again arise in the event of a new breach by the defenders. By continuing their own rights under the contract, as they alone were at liberty to do, they continued the defenders' rights also. In short, they preserved the contract with all rights and obligations *hinc inde*, and so that a breach might thereafter be committed on either side. The original limit of endurance was of course gone, and with no other substitute than the law and good sense reasonably implied in the altered circumstances, viz., that each party should perform his part on the requisition of the other, given with reasonable notice.

I am therefore of opinion that on 18th June 1879, when the pursuers' works were closed, the contract was current and subsisting in favour of both the parties to it, and that in considering their re-

spective rights and obligations under it at that time the pursuers take no advantage, and the defenders no prejudice, from the circumstance that the former were at liberty to cancel had they seen fit (which they did not) on the expiry of the first six months of 1878.

On the 18th June the pursuers informed the defenders of the stoppage of their works for "the present," and that they had "made arrangements with some of our friends to manufacture for us the iron which we are under contract to deliver to you," and requested specifications for the 118 tons of plates still undelivered under the contract in question. On the following day the defenders answered—"We prefer to wait till you have reopened before specifying for more plates." Thereupon (on 20th June) the pursuers intimated that they cancelled the contract and claimed damages for breach. This action is the result, and the question is, whether the defenders' declinature to specify for plates to be manufactured by the friend with whom the pursuers had arranged to manufacture for them, and resolution to wait till the pursuers' works were reopened, is a breach of contract entitling the pursuers to cancel and sue for damages?

This question depends on the meaning of the contract—whether it is for ship plates of the pursuers' manufacture or for ship plates of anybody's manufacture, of a quality to pass "Lloyd's surveyor;" and I am of opinion that it is for ship plates of the pursuers' manufacture.

It is matter of common knowledge that ship plates are of various forms and dimensions, according to the size of the ship and the parts of the ship they are wanted for, and it is accordingly admitted "that in order to enable pursuers to execute the contract it was necessary for defenders to furnish specifications." I notice this in order to observe that the contract was not only for a manufactured article, but for an article to be manufactured as ordered, and according to specifications furnished from time to time. Now, I venture to think it is a generally, if not universally, true proposition that such a contract made with a manufacturer of the article to be made and supplied under it, implies that the article shall be of his manufacture. That the parties meant otherwise may be expressed or even collected from the whole tenor of the contract, but *prima facie* the meaning of the contract in my opinion is as I have stated. A contract for a commodity of common use entered into with a man who is a dealer as well as a maker is quite different. He must supply the goods of the quality bargained for, no matter where he gets them. But if he is only a manufacturer of the goods contracted for, the implication, without the necessity of express words, is that he shall supply goods of his own manufacture. Nor is it material, in my opinion, or a relevant subject of inquiry, that his goods are really no better than those of many other manufacturers. This is generally true of all manufactured goods. I may observe, though I attach no importance to the circumstance, that neither in the prior correspondence nor on the record did the pursuers inform the defenders to whom they intended to hand their specifications for execution. At the commencement of the proof they announced that they were prepared to prove an arrangement with the Stockton Malleable Iron Company, who were ready to supply the

defenders with plates equally good and of equal market value with their own. To save the necessity of leading the evidence the defenders gave the second admission. I think the fact immaterial. Indeed, it is clearly and admittedly so, unless the contract was for plates of any manufacture, provided they were of quality to pass Lloyd's surveyor. It was, however, suggested that this criterion of "quality" excluded the notion of a particular maker being contemplated, or was somehow inconsistent or at variance with it. I cannot profess to comprehend this view. It is, I imagine, a universal or at least very common term in every contract for materials used in shipbuilding in this country that they shall be of a "quality" to pass Lloyd's surveyor, so that one would expect to meet it and be surprised to miss it in any such contract. It means that the manufacturer (or dealer), whoever he may be, shall take back and replace such articles as the surveyor condemns, and has no bearing that I see on the question in hand.

The clause about the suspension of the supplies during the stoppage of the works from unavoidable causes is material only as confirming the view, which I think otherwise clear, that the contract was with the pursuers as manufacturers. They were clearly not bound, as dealers would have been, to go into the market to enable themselves to fulfil the contract, and I cannot assent to the suggestion that although not bound they might if they pleased—unless, indeed, their customers also pleased, which probably often happened in good times. A supply from other works is not according to the terms of the contract so far as the pursuers are concerned, for they are confessedly not bound to implement it at all unless they can do so from their own works. I think it follows that the defenders are not bound to take a supply from other works. I notice this provision only because it was referred to in the argument, for in my opinion it only superfluously confirms the view that the contract was for goods to be manufactured at the pursuers' works, so that they should be relieved of the obligation to deliver, and the defenders deprived of the right to receive delivery, so long as their works should happen to be stopped.

I am therefore of opinion that the answer which the defenders returned to the pursuers' requisition of 18th June was no breach of contract, and gave no right of action.

LORD ORMDALE not having been present at the discussion gave no opinion. His Lordship read the following opinion by the Lord Justice-Clerk, who was absent:—

LORD JUSTICE-CLERK—I need not resume the details which Lord Gifford has explained, but I can very shortly state the reasons on which I concur in his opinion.

This is a contract of purchase and sale of iron plates, the terms of which are contained in a written sale-note which specifies the amount, quality, and price of the article sold, and regulates the mode and terms of delivery.

The seller, in pursuance of the conditions so expressed, has tendered to the buyer an instalment of the commodity which was the subject of the sale. It is admitted that the iron plates so tendered were of the requisite quality, but the

buyer refuses to receive them in implement of the contract because they were not manufactured by the seller.

The first answer which is made to this objection is that no such condition is stipulated in the contract, that the nature and quality of the article sold is expressly described in the written sale-note, and that his obligation is sufficiently fulfilled by the seller if he delivers iron plates which correspond to that description.

I think that reply is *prima facie* conclusive, unless it can be shown that the written words of the contract imply a condition which is not expressed, or that it is competent to look outside the contract, and that going outside the contract the nature of the bargain creates such a condition, although the words do not of themselves imply it.

It is said, in the first place, that because these plates are bought from a manufacturer of plates the contract necessarily relates to plates manufactured by himself, and to no other—in other words, that the contract must receive a different interpretation with the seller, because he is a manufacturer of such articles, from that which it would receive if made with a general dealer. I can see no ground for importing into the contract any such condition. The implication in an ordinary contract of sale is the contrary. It is no concern of the buyer in what way the seller may acquire or provide himself with the article sold, provided it be in conformity with the conditions of the contract; and if the sellers here had been general dealers as well as manufacturers there would have been no room for the suggestion. But this is not a contract for the manufacture of an article, but one for the sale of it; and I can find no principle for importing into it a condition which the contract of sale does not imply.

If, indeed, it could be shown that from the nature of the commodity bargained for some special value or quality attached to the goods manufactured by the seller which would not attach to those manufactured by others in the trade, and averments to that effect were subsequently made, we might, perhaps, look beyond the words of the written instrument to discover the fact, although in general the written words are the only rule. But there is no such averment here. It is matter of express admission that the iron plates tendered were "equally good and of equal marketable value" with those which the pursuers were in use to manufacture; nor is it said that they were deficient in any quality stipulated in the written contract.

If, however, we do look beyond the words of the contract, the defenders in this case will not fare better. It is quite evident from the communication made by the defenders to Messrs Armstrong Brothers of the 6th of November 1877, out of which the contract arose, that this plea is entirely an afterthought. It clearly appears that the defenders had no special view to iron plates manufactured by the pursuers, but to any iron plates, by whomsoever manufactured, of the quality specified, and at a price they thought remunerative. This, no doubt, will not control the written contract, but it is quite consistent with its terms, and if the written contract is to take colour from the surrounding circumstances, the fact seems conclusive against the plea now attempted.

It is true that by Lloyd's regulations makers of iron plates are bound to stamp them with their names, and if this stamp had any relation to marketable quality it might have afforded some colour to the plea. But it is certain that the rule has no such object. It is introduced for an entirely different purpose—to give the means of tracing imperfect plates—and is in no respect a test of quality in the market.

The clause concerning strikes seems to have no bearing on this question. It was a clause in favour of either party, to take effect while their respective workmen might be on strike. The sellers were not to be obliged to provide themselves otherwise, if their workmen prevented them by a strike from manufacturing for themselves, nor were the buyers to be obliged to take delivery when the strike of their workmen suspended their power of turning the iron plates to profit. But if in such a case the buyers still elected to take delivery notwithstanding that their workmen were on strike, the sellers were not liberated from their obligation, and so here, although it is of course a loss to the sellers to provide themselves from without—and they are not bound to do so—the buyers remain under the contract, and are obliged to accept what is tendered in conformity with its terms.

The Court recalled the Lord Ordinary's interlocutor, and decreed in terms of the conclusions of the summons, with expenses.

Counsel for Pursuers—Solicitor-General (Bal-four)—Jameson. Agents—Millar, Robson, & Innes, S.S.C.

Counsel for Defenders—Kinnear—Gillespie. Agents—J. & J. Ross, W.S.

Wednesday, July 7.

## SECOND DIVISION.

### WARDLAW'S TRUSTEES v. WARDLAW AND OTHERS.

*Husband and Wife—Marriage-Contract Provisions—Liferent and Fee—Vesting in Children of Marriage.*

In an antenuptial contract of marriage the funds provided by the wife were conveyed to trustees in trust for behoof of the spouses "in conjunct fee and liferent, and for the liferent use allenary" of the husband, and for the use and behoof of the children to be procreated betwixt them in fee. A power of apportionment among the children was given to the father, and a power conferred upon the trustees to pay or make over to the wife "such part or portion of the said funds and estate, heritable and moveable, as they shall think fit, on application made by her to that effect, to be used and disposed of by her as her own proper funds and estate." The marriage was dissolved by the predecease of the husband. *Held* that the estate vested in the children of the marriage as at the date of the dissolution thereof, and that the representatives of a child who survived his father

but predeceased his mother were entitled to participate in the division of the fund.

*Succession—Heritable and Moveable—Conversion.*

*Held* (rev. Lord Ordinary, and *diss.* Lord Gifford) that the vested right of the children as a *jus crediti* under the marriage-contract was personal and moveable, and that its character could not be affected, so as to determine the course of transmission of that right in the case of a child who predeceased the period of division intestate, by the nature of the estate actually found in the hands of the trustees at the period of vesting or of division.

By contract of marriage between William Wardlaw and Margaret Richardson, dated 11th November 1822 and recorded 23d September 1870, Mr Wardlaw bound himself, his heirs, executors, and successors, "to provide the one-half of the whole lands, heritages, sums of money, and other funds that he shall happen to conquest and acquire during the present intended marriage to the fore-said Margaret Richardson, his promised spouse, in liferent for her liferent use allenary, in case she shall happen to survive him, and to the children, one or more, to be procreated of this marriage in fee, and that by vesting the same in the persons of the trustees after named, and in the terms and for the ends, uses, and purposes after specified; and for ascertaining the extent of the said conquest, it is hereby agreed that the same shall comprehend and extend to all and whatever estate, heritable and moveable, belonging or owing to the said William Wardlaw at the dissolution of the marriage, whether the same has accresced by purchase, donation, or succession, after deduction of the debts due by him." He also provided his household furniture to his intended spouse in case she should survive him, and that provision was accepted by her in full of her legal claims. Mrs Richardson on her part disposed, assigned, conveyed, and made over to and in favour of certain trustees, "but in trust for behoof of the said William Wardlaw and Margaret Richardson in conjunct fee and liferent, for the liferent use allenary of the said William Wardlaw, and exclusive of the *jus mariti* or right of administration of the said William Wardlaw, and for the use and behoof of the children to be procreated betwixt the said William Wardlaw and Margaret Richardson in fee, and that in such proportions as the said William Wardlaw shall appoint by a writing under his hand, which failing, equally among them, the said children, share and share alike, all and sundry whatsoever lands, heritages, sums of money, and other funds or effects, heritable or moveable, presently owing and belonging, or which she the said Margaret Richardson may succeed to or acquire in any manner of way, and particularly, without prejudice to the said generality, the sum of £900 sterling presently owing and belonging to her in her own proper right, with the interest due thereon; and the said William Wardlaw hereby renounces his *jus mariti*, and all right or power of administration whatever competent to him in or to the said estate, funds, and succession in any way whatever; and it is hereby declared that it shall be in the power of the said trustees, or major number of them allenary, and of no other person whatever, to pay or make over to the said Margaret Richardson such part or portion of the said funds and estate, heritable and moveable, as they shall think fit, on applica-